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Promotion and consolidation of democracy

Working paper by Mr. Manuel Rodriguez Cuadros on the measures provided in the various international human rights instruments for the promotion and consolidation of democracy, in accordance with the mandate contained in decision 2000/116 of the Sub-Commission on the Promotion and Protection of Human Rights

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I. INTRODUCTION

1. At its fifty-second session, the Sub-Commission on the Promotion and Protection of Human Rights approved decision 2000/116 entrusting me with the task of preparing a working paper on the measures provided in the various international human rights instruments for the promotion and consolidation of democracy, taking into account the terms of Commission on Human Rights resolution 2000/47, for submission to the Sub-Commission at its fifty-third session.

2. Commission on Human Rights resolution 2000/47 on promoting and consolidating democracy calls upon States to consolidate democracy through the promotion of pluralism, the protection of human rights and fundamental freedoms, maximizing the participation of individuals in decision-making and the development of competent and public institutions, including an independent judiciary, effective and accountable legislature and public service and an electoral system that ensures periodic, free and fair elections. It also contains a series of recommendations to States to take steps to promote, protect and respect all human rights and fundamental freedoms; to strengthen the rule of law; to develop, nurture and maintain an electoral system that provides for the free and fair expression of the people's will through genuine and periodic elections; and to strengthen democracy through good governance of public affairs, by improving the transparency of public institutions and policy-making procedures and enhancing the accountability of public officials, by promoting sustainable development and by enhancing social cohesion and solidarity.

3. The concepts and norms of the Commission's resolution 2000/47 are related to those of its earlier resolution 1999/57, of 27 April 1999, on promotion of the right to democracy, which is significant because it was the first text approved in the United Nations that recognized the existence of a right to democracy. Referring to developments in international law related to the recognition of democracy as a value under international protection and to its interdependence with human rights, resolution 1999/57 recalls that the large body of international law and instruments, including the resolutions of the Commission on Human Rights and those of the General Assembly, confirm "the right to full participation and the other fundamental democratic rights and freedoms inherent in any democratic society".[1]

4. This appreciation of the development of international law linked to democracy as a system of government that allows the realization of human rights is followed by the recognition that the right to development and the principle of the right of self-determination of peoples are concepts that are mutually interdependent with democracy and human rights.

5. Among the components of the right to democracy, resolution 1999/57 recognizes that the rights of democratic governance include, inter alia, the following: (a) the rights to freedom of opinion and expression, of thought, conscience and religion, and of peaceful association and assembly; (b) the right to freedom to seek, receive and impart information and ideas through any media; (c) the rule of law, including legal protection of citizens' rights, interests and personal security, and fairness in the administration of justice and independence of the judiciary; (d) the right of universal and equal suffrage, as well as free voting procedures and periodic and free elections; (e) the right of political participation, including equal opportunity for all citizens to

become candidates; (f) transparent and accountable government institutions; (g) the right of citizens to choose their governmental system through constitutional and other democratic means; and (h) the right to equal access to public service in one's own country.

6. With regard to the competence and responsibilities of United Nations bodies related to the promotion and protection of human rights, Commission on Human Rights resolution 1999/57 requests the Office of the United Nations High Commissioner for Human Rights to continue and expand its programmes and projects of technical cooperation to promote democracy and the rule of law and to give priority assistance to such programmes. It also requests human rights treaty bodies and the human rights mechanisms of the Commission and Sub-Commission to pay due attention, within their mandates, to those elements of democratic governance outlined earlier.

7. The mandate received from the Sub-Commission to prepare this working paper is set against that normative background, more specifically the provisions of paragraph 1 of resolution 2000/47 and the provisions of Commission resolution 1999/57.

8. In the light of the above, the purpose of the working paper I submit herewith for the Sub-Commission's consideration at its fifty-third session is to present an ordered, preliminary outline of the current normative and practical development of international protection of democracy and the ways it is dealt with in universal and regional, legal and political instruments, with an emphasis on mechanisms of institutional and collective action for its promotion, consolidation and preservation. Since this is an introductory paper, giving only a general outline of a complex, diversified subject, the individual topics it covers have not been dealt with in any great depth. In the event of a final report, both the basic scheme of analysis and the analytical treatment of each topic would of course need to be perfected, expanded and treated in greater detail.

II. HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW

9. In the modern world, human rights constitute a system of values and international law which is universal in scope. The doctrine of human rights, from an axiological point of view, rests on the consideration that the human condition and human dignity entitle the individual to a set of essential rights. From the point of view of political theory, this set of human rights is worked out in the sphere of relations between the State and the individual, on the assumption that legitimate State action, which is derived from an act of popular sovereignty, must recognize and guarantee the enjoyment of the fundamental freedoms and human rights of individuals. There is a clear and definite limit to the jurisdictional exercise of State power, especially in the personal sphere, which is the respect of and non-interference with the exercise of fundamental freedoms and human rights. From the point of view of the State's responsibility, however, the doctrine of human rights presupposes not only a duty not to act, to abstain, or not to interfere, but also the exercise of a duty to guarantee.

10. Thus the legal relation between the State and the individual rests essentially on the non-interference by the power of the State with the enjoyment of fundamental rights and on the exercise by the State of the duty to guarantee. With the establishment of second-generation rights, not only individuals are recognized as the holders of rights, but also groups of individuals, following the introduction of a collective entitlement to certain human rights in positive law.

At the same time, the State assumes obligations to act. Economic, social and cultural rights, like credit rights, are also part of the legal relation between the State and the individual and between the State and the national community.

11. In this context, relations between the State and the individual and the State and the national community, from a legal point of view and from the point of view of the exercise of political power, are determined by the structure of the State and the political system.

12. If the enjoyment of human rights depends on their recognition and guarantee by the State and the political system, and if the exercise of human rights, whether individual or collective, requires a State structure and a political system which does not interfere with first-generation rights and which promotes the realization of second-generation rights, then the link between human rights and the political system of government is one of mutual interdependence. It is in this setting, that is, of the effectiveness of the State structure and the political system of government in guaranteeing the free exercise and enjoyment of human rights, that the interrelationship between democracy and human rights is played out.

13. Regardless of the debate about its definition and scope, democracy has a basis with regard to which, at least in the sphere of constitutional and international law, there is universal consensus. This underlying concept of democracy is the principle of the self-determination of peoples as the expression of popular sovereignty. If the people holds the constituent power of any political system, the latter must ensure that the people's sovereignty in this sense always resides in democratic forms of the people's will. The protection of human rights and the exercise by the State of its duty of guarantee require that the established power (system of government or political system) should be exercised within precise, legally prescribed limits, so as not to interfere in the area of individual freedom enjoyed by citizens.

14. The rule of law, for its part, presupposes a form of organization, the basic characteristic of which is the limitation and control of authority, through the law, with the aim of safeguarding freedom.[2] From the political point of view, moreover, it entails basic principles aimed at ensuring that the people's sovereignty is never subdued by abuse of the State's authority. The rule of law requires at least three limitations on State authority: a material limitation, related to the respect for and guarantee of fundamental freedoms and human rights; a functional limitation, in the form of a division of powers; and a temporal limitation, expressed as the periodic renewal of the people's will through free and fair elections. In more specific terms, the rule of law means applying the principle of legality and constitutional rules, the separation of public powers, the recognition and safeguard of individual freedoms, civil, political, social, economic and cultural rights, administration of justice independent of the political power, control over the exercise of public authority, institutions that guarantee the enjoyment of fundamental freedoms and human rights, and the remedies of habeas corpus, amparo and the protection of citizens against administrative acts.

15. The rule of law provides the most advanced and functionally most effective form of organization for the enjoyment and protection of human rights. This mutually dependent relationship originated in the historic acceptance of human rights, with the recognition of the guarantee of due legal process and the independence of the system of justice as a universally recognized individual human right.

16. The basic elements of the rule of law are enshrined in the Universal Declaration of Human Rights. The Preamble to the Declaration establishes that human rights must be protected by the rule of law, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression. The expression "rule of law", in the context of the Universal Declaration, should be understood as a reference to a constitutional rule of law, whereby the powers and limits of governmental authority, as well as the rights and freedoms of citizens, are recognized and established in a legal corpus, which takes precedence over subordinate legislation, and whose approval or modification is subject to the sovereign will of the people.

17. Article 29, paragraph 2, of the Universal Declaration establishes that, in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. Apart from recognizing the relation between the State and the individual as a link based on the free exercise of fundamental freedoms and human rights, this provision establishes precise limits on State action on the assumption that certain restrictions may justifiably be placed on the exercise of human rights, by their very nature, although such restrictions should be exceptional and temporary and should always be compatible with the principles and norms of a democratic society.

18. The Universal Declaration also refers to the independence of the administration of justice and the guarantees of due legal process which the State must ensure.[3] Article 8, which took its inspiration from the remedy of amparo introduced by the 1911 Mexican Constitution, gave universal effect to everyone's right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

19. The link between the rule of law and democracy was also established in the Universal Declaration, when it stated that the sovereignty of the people is the only legitimate source of governmental authority: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."[4]

20. The International Covenant on Civil and Political Rights extends and develops the provisions linking human rights with the rule of law and democracy, especially with regard to the separation of powers, the independent administration of justice, the guarantees of due legal process and the provision of judicial remedies against any act by the State or State agents that is detrimental to individual freedoms and the human rights of persons. The provisions contained in articles 14 and 15 are particularly important in this respect. The Covenant also enshrines the right to electoral democracy by affirming the protection of political rights, in particular the right to take part in the conduct of public affairs, directly or through freely chosen representatives, the right to have access, on general terms of equality, to public service, and, in particular, the right for all "to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors".[5]

21. The reference in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights to the elements that make up a democratic society, such as the limitation on any temporary restrictions which the law may impose on the exercise of fundamental rights and freedoms, recognizes the existence of a functional, normative and material interrelationship between the enjoyment of human rights and democratic society. Those instruments thus forbid any restriction on fundamental rights and freedoms arising from values, requirements or motives that are alien or contrary to a democratic society.

22. This interrelationship or relation of mutual dependence between human rights, the rule of law and democracy has also been given expression in the 1948 American Declaration of the Rights and Duties of Man (art. XXVIII), the Convention for the Protection of Human Rights and Fundamental Freedoms approved by the member States of the Council of Europe in 1950 (art. 11) and the American Convention on Human Rights, signed on 22 November 1969 (art. 29). In the judicial practice of the European Court of Human Rights and the Inter-American Court of Human Rights, the interrelationship between democracy and human rights has been legally established on the basis of the provisions set out in those instruments. In its Advisory Opinion OC-6/86 concerning the meaning of the word "laws" in article 30 of the American Convention on Human Rights, the Inter-American Court of Human Rights stated that the terms of the Convention should be interpreted within the context of the functional structure of the "democratic State". In its considerations concerning the scope of the expression "general welfare" as a legitimate basis for restrictions on specific rights and fundamental freedoms, the Inter-American Court stated that: "... it is possible to understand the concept of general welfare as referring to the conditions of social life that allow members of society to reach the highest level of personal development and optimum achievement of democratic values. In that sense, it is possible to conceive of the organization of society in a manner that strengthens the functioning of democratic institutions and preserves and promotes the full realization of the rights of the individual".[6]

23. The principle that human rights are realized within a democratic society was also maintained by the Inter-American Court in its judgements in the cases Velásquez Rodríguez/1968 (paras. 164-166) and Godínez Cruz/1989 (paras. 173-175). In those judgements, the Inter-American Court drew attention to the State's duty to be functionally organized so as to permit the realization of human rights in these terms: "The second obligation of the State parties is to 'guarantee' the free and full exercise of the rights recognized in the Convention for any person under their jurisdiction. This obligation implies that the States have a duty to organize the whole Government machinery and, in general, all structures through which the exercise of governmental authority is manifested, in such a way that they can legally ensure the free and full exercise of human rights."[7] The case-law of the European Court of Human Rights is similar.

24. The Universal Declaration of Human Rights and, subsequently, the Covenants, could not refer directly to democracy as a right, since any attempt to do so was thwarted by the ideological confrontation arising from the cold war. Those instruments opted instead to separate out the basic elements of the rule of law and democracy and to deal with them as separate rights, particularly the right to free and fair elections, citizens' access to the public service and the conduct of government on a non-discriminatory basis.

25. In the regional development of international human rights law, however, especially in the European and American systems, normative links between democracy and human rights became much more specifically established, even during the cold war period.

26. The Charter of the Organization of American States, approved in 1948, states in its article 3 (d) that "The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy."[8] In complementary fashion, the American Declaration of the Rights and Duties of Man, in its article XX, maintains that: "Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free."[9]

27. In those terms the inter-American system represents democracy as a common value, as a condition and as a system of government which must allow the realization of human rights, recognizing everyone's right to electoral democracy, on the basis of the periodic renewal of government authorities and the free and genuine exercise of the popular will in elections.

28. American international law has simultaneously developed principles and norms related to non-interference in internal affairs and self-determination. In theory, these would appear to contradict the obligation of OAS member States to be organized politically on the basis of representative democracy. This is not so, however, firstly because the rule which establishes the condition of a democratic and representative political system constitutes an international obligation agreed to in the free exercise of national sovereignty; and secondly because it expresses the dual character of the principle of self-determination, which has an internal component - in this case related to the sovereignty of the people expressed in free and genuine elections within democratic systems, which is raised to the status of an international undertaking - and an external component, related to non-interference by third countries in the internal affairs of an established democratic government.

29. In this way, the idea emerges in the OAS Charter that democracy in the inter-American system constitutes an international obligation. As the norms and institutions of the inter-American system have developed subsequently, especially after the cold war, the binding nature of the institution of democracy has gradually been refined until it has given rise to undertakings of collective action for the defence and preservation of democracy, including sanctions.

30. The Convention for the Protection of Human Rights and Fundamental Freedoms, which was signed in Rome in 1950 by the member States of the Council of Europe, was also drafted on the assumption that the realization of human rights implies the existence of a democratic political system operating under the rule of law.

III. GRADUAL INTERNATIONALIZATION OF THE PROMOTION, CONSOLIDATION AND PRESERVATION OF DEMOCRACY

31. As the Secretary-General of the United Nations has noted: "Within the original framework of the Charter, democracy was understood as essential to efforts to prevent future

aggression, and to support the sovereign State as the basic guarantor of human rights, the basic mechanism for solving national problems and the basic element of a peaceful and cooperative international system."[10] This assumption was taken up as a much more explicit frame of reference in the Universal Declaration of Human Rights, and in General Assembly resolution 1514 (XV), which adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960.

32. These basic instruments of the United Nations were the initial points of reference upon which the Organization could base its action to promote democratic processes worldwide. However, their potential was held back by the nature of the ideological debate and the politics of the cold war. Consequently, for several decades United Nations efforts in the area of democracy focused almost exclusively on the promotion and protection of human rights, particularly following the signing of the Covenants and the development of United Nations protection machinery based on the Charter or on treaty provisions.

33. The end of the cold war brought with it a national and international environment more conducive for peoples to achieve their democratic aspirations. From the late 1980s, and especially from the start of the 1990s, there was a growing trend towards the universalization of democracy as a system of government, a social and political process and a value related to human rights.

A. The promotion of democracy and the holding of free and fair elections in United Nations practice

34. The Charter of the United Nations contains no direct reference to democracy. However, its provisions concerning the international trusteeship system (Chapter XII), and in particular Article 76 (b), aimed from the outset at the realization of democratic objectives, conceiving the trusteeship system within the broader objective of application of the principle of self-determination. The interpretation by the United Nations of Chapter XII of the Charter and its normative link with the principle of self-determination helped almost all the United Nations Trust Territories to gain access to independence.[11] In this practice, democratic processes were developed, with emphasis placed on the affirmation of fundamental freedoms, political rights (the right to citizenship, the right to vote), freedom of expression, freedom of the press and freedom of assembly, measures to combat discrimination on grounds of race, sex and religion, and recognition and promotion of the rights of women.[12]

35. From these limited beginnings, as an expression of advances in the process of democratization that took place from the end of the 1980s, in 1988 the United Nations began to adopt resolutions related to democracy and promotion of the principle of the holding of free, periodic and genuine elections.

36. The experience of the United Nations in electoral verification and observation began with its activities in the Trust and Non-Self-Governing Territories. A particular case was Namibia, a complex and large-scale process that culminated in the holding of free and fair elections, opening up the way for Namibia's independence. Verification and observation in Member States has its earliest antecedents in the United Nations mission sent to observe the plebiscite on the Panama Canal Treaties in October 1977, but elector observation and verification in the context

of democratic processes really began with the decision adopted by the Secretary-General pursuant to General Assembly resolution 43/24, establishing an agreement with the Nicaraguan Government to send a mission to observe the elections in Nicaragua. The United Nations Observer Mission for Verification of the Elections in Nicaragua (ONUVEN) had the following mandates: verifying that the political parties were equitably represented in the Supreme Electoral Council and its subsidiary organs; verifying that the political parties enjoyed full freedom to organize and mobilize without any form of hindrance or external influence; verifying that all political parties had fair access to State radio and television; verifying that electoral registers were properly drawn up; and the power to inform the Supreme Electoral Council of complaints received and of any irregularities or interference detected in the electoral process.[13]

37. Starting from this experience, and with the development of democratic processes in every region of the world, United Nations activities in observing and assisting elections have increased, and have gone beyond simply supervising events on the day of elections, shifting to the "consolidation of institutions and processes which are essential to viable democracies".[14]

38. In that context, since 1989 the United Nations has received more than 140 requests for electoral assistance. In 1992, pursuant to General Assembly resolution 46/137, electoral assistance activities were brought together under the electoral assistance unit, which was strengthened in 1994 and became the Electoral Assistance Division within the Department of Political Affairs.

39. The objectives of United Nations electoral assistance are basically twofold: (a) to assist Member States in their efforts to conduct legitimate democratic elections in accordance with the international criteria laid down by international and regional human rights mechanisms; and (b) to assist in institutional capacity-building to enable the countries concerned to organize democratic, genuine and periodic elections, enjoying the confidence and acceptance of the political parties and electorate.

40. But it is not only the Secretariat that is involved in electoral assistance activities, as practically all the organs of the system have gradually become involved. In particular, the Electoral Assistance Division coordinates its work with UNDP, the Department of Economic and Social Affairs, the Office for Project Services and the Office of the United Nations High Commissioner for Human Rights, also promoting the active participation of other civil society bodies and organizations that provide a source of external electoral assistance. Institutions that collaborate with the United Nations in electoral observation missions include the Commonwealth, the European Union, the Organization of African Unity, the Organization of American States, the Organization for Security and Cooperation in Europe, the Inter-Parliamentary Union, the Centre for Electoral Promotions and Assistance, the International Institute for Democracy and Electoral Assistance, the International Foundation for Electoral Systems, the National Democratic Institute for International Affairs and the Carter Center.

41. The characteristics and scope of electoral observation missions vary greatly, ranging from coordination and support of international missions, technical assistance to national electoral authorities, support for national electoral observers and limited observation, to the dispatch of electoral missions requiring a mandate from the General Assembly or Security Council.

The latter are on a larger scale, since they may involve the verification and supervision of the electoral process and even the whole organization and management of that process. Such verification missions, usually linked with peacekeeping operations, have been conducted in Angola, El Salvador, Eritrea, Haiti, Liberia, Mozambique, Nicaragua and South Africa, amongst others.

42. With the increase in and growing demand for electoral assistance, the United Nations has been able to improve and standardize its methods and procedures, moving gradually towards a perception of the task that goes beyond the mere observation or supervision of the electoral process and gives priority to the establishment or strengthening of democratic institutions.

43. Accordingly, the United Nations has set up a series of programmes designed to promote democracy and democratization. Essentially these are directed at four areas of action: (a) cooperation that is designed to create a democratic mentality and directed at all members of society, whether government officials, political leaders, parliamentarians, the judiciary, the police, members of the armed forces or the population as a whole; (b) electoral assistance, aimed at assisting national efforts to conduct free elections and ensure that these elections give rise to legitimate governments; (c) institutional support for the creation or strengthening of the rule of law, which involves a wide variety of activities aimed at the reform and strengthening of legal and judicial systems; the institutionalization of constitutional bodies for the protection of human rights; the creation of police forces and armed forces that respect human rights and the rule of law; and, lastly, (d) support for the creation or strengthening of social institutions or processes that form part of democratic life, such as the promotion of independent trade unions or participation by women in political and social life.

44. These programmes conducted by the Office of the Secretary-General are supplemented by the democracy-related components of the peacekeeping missions authorized by the Security Council and by the programmes for the promotion of democracy and the strengthening of the rule of law carried out by the office of the United Nations High Commissioner for Human Rights and the specialized agencies.

45. The United Nations also has a programme to support efforts by Governments to promote and strengthen new or restored democracies. The General Assembly, in its resolution 51/31, supported the initiatives of the Secretary-General in this respect and requested him to submit a report "including innovative ways and means as well as other reflections, to enable the Organization to respond effectively and in an integrated manner to requests of Member States for assistance in the field of democratization".[15]

46. The United Nations maintains ongoing cooperation with the new or restored democracies and conducts a specific programme of assistance in coordination with UNDP.[16]

B. Protective norms and mechanisms for the promotion and protection of democracy in the Americas

47. The legal interdependence between democracy and human rights was established at an early stage in the American continent. The American Declaration of the Rights and Duties of Man, approved in 1948 some months prior to the Universal Declaration of Human Rights,

recognized that the inter-American system of protection consisted of the functional combination of the provisions protecting human rights contained in the American Declaration itself and "the guarantees given by the internal regimes of the states".[17] The nature of this political regime was defined by the charter of the Organization of American States, which proclaimed that one of its purposes was to promote and consolidate representative democracy, with due respect for the principle of non-intervention.

48. These basic provisions, which were aimed at further development of standards, received only limited and ambivalent application within the context of the cold war. The confrontational strategies of the democratic, revolutionary and nationalist forces, and those opposed to the status quo in general, committed the OAS to policies that lent impetus to the ideological struggle. In many cases normative commitments to encourage democracy, respect human rights and respect the principle of non-intervention were left aside. Throughout much of the cold war, while the world was divided into ideological blocs, the principles concerning the promotion of democracy and respect for human rights were overwhelmed by widespread instances of intervention, the overthrow of democratically elected Governments, the establishment of military dictatorships and the massive and systematic violation of human rights.[18]

49. From the late 1980s onwards constitutional governments gained ground in the Americas and military regimes gradually disappeared. In the early 1990s, coinciding with the end of the bipolar tension and the transition to a new international system, democratic regimes spread across the region. The conditions were created for resuming the legislative initiatives on democracy that had been interrupted in the 1940s. Today the OAS has a relatively advanced system for the promotion and protection of democracy. As far as norms are concerned, the OAS Charter now in force establishes that "the solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy".[19] Within the inter-American system, therefore, democracy has now become a prerequisite for membership of the OAS. Some authors invest it with the legal status of an international obligation.[20] The normative mechanisms for promoting and safeguarding democracy are evolving rapidly in accordance with a practice which has always been ambivalent. These mechanisms vary in their nature, scope and efficacy.

50. Declarative action is normally a means of exerting influence and diplomatic pressure. It is applied through formal pronouncements by the governing bodies of the OAS regarding the situation of democracy in the country concerned. In circumstances justified by threats to democracy or deterioration in the democratic institutional process, the Secretary-General of the Organization is empowered to undertake information and evaluation missions. In the event of occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the member States, the Secretary-General of the Organization may initiate a procedure culminating in an ad hoc meeting of the ministers of foreign affairs and the adoption of measures aimed at re-establishing the democratic institutional process. Since this is a mechanism of urgent action it must be completed within a period of 10 days.

51. The sanctions were authorized by the Protocol of Washington, which introduced substantial amendments to the OAS Charter. They are applied solely in the event of the illegitimate access to power of a government that overthrows a democratically constituted

government. In such a case, and only after the failure of diplomatic initiatives to re-establish the democratic order, the member State is suspended in the exercise of its right to participate in all the organs of the system.

52. In practice, no sanctions have been applied up to now, while OAS resolution 1080 has been applied in the cases of Haiti (1991), Peru (1992), Guatemala (1993) and Paraguay (1996). The results have been ambiguous. While in the cases of Haiti and Guatemala collective action was effectively designed to re-establish the impaired democratic order, in the case of Peru it amounted to the legalization of a "government coup" that dissolved Congress and gradually abolished the separation of powers, through the international recognition of the creation of a new parliament suited to the needs of a non-democratic government.[21]

53. The Peruvian crisis brought about by the wish of President Alberto Fujimori to be re-elected for a third term once again tested the mechanisms of the inter-American system. In this case resolution 1080 was not applied but, on the basis of the general principles contained in the Charter, a special commission was appointed to contribute to the internal dialogue and facilitate a democratic outcome to the crisis. Finally the OAS, following a series of vacillations, was able to take action on two fronts with favourable results. First of all, it promoted a dialogue between the Government and the opposition which was pressing for democratization; and secondly, it sent an electoral observation mission which became actively involved and helped to prevent any obvious attempt at fraud.

54. On the basis of the Peruvian experience, the OAS initiated a process to standardize and strengthen its mechanisms for the promotion and protection of democracy. At the initiative of Peru, the ministers of foreign affairs, acting on behalf of the heads of State and Government, are due to approve an Inter-American Democratic Charter in September 2001. The basic text of this Charter recognizes the right of the peoples of the Americas to democracy and extends the possibility of applying sanctions to cases in which, without a democratic Government being overthrown, there is evidence of severe impairment of the democratic system.[22]

55. This "democracy clause" was adopted in the context of the so-called Summit of the Americas process, which refers to the periodic meetings of the Heads of State and Government of the Americas, together with all the programmes and initiatives arising out of that process, including the creation of a free trade area for the Americas by the year 2005. At the latest meeting of the Heads of State of the Americas, held in Quebec on 21 and 22 March 2001, a democracy clause was adopted stating that the unconstitutional alteration or interruption of the democratic order in any of the countries would lead to the suspension of the country concerned from the Summit process.

56. An initial consequence of this agreement was the adoption at the thirty-first session of the OAS General Assembly of a resolution encouraging the Inter-American Development Bank to apply the democracy clause adopted as part of the Summit process. The application of the democracy clause by the IDB amounts to the establishment of an economic sanction procedure.

57. The recognition of democracy as a value that is related to the enjoyment of human rights and fundamental freedoms, which should be placed under international responsibility in the Americas, is not confined to the inter-American sphere. At the same time, various bodies

responsible for integration agreements or mechanisms for concerted political action and coordination have adopted democracy clauses by means of resolutions or treaty instruments. To varying degrees these clauses introduce the sanction of suspension of participation rights for Governments that attack the democratic system. Democracy clauses of this kind have been adopted by the Andean Community, Mercosur, the Rio Group and the Central American Integration System.[23]

58. These normative developments, which establish collective responses to the possibility of interruption or alteration of the democratic order, in some cases have a political connotation and in other cases are of a legal nature. Thus a normative process is taking place in the Americas that is directed towards the recognition of democracy as an obligation and a duty and the recognition of the impairment of the democratic system as an act that may entail international responsibility.

C. Protective norms and mechanisms for the promotion and protection of democracy in Africa

59. In the African continent, despite the existence of many conflict situations and the impact of poverty and extreme poverty on social and national cohesion and the ravages being caused by the HIV/AIDS epidemic, the social and State forces behind the democratization process have made some very significant advances. At no time since the start of the independence process has electoral democracy been as widespread as at present. This has led to recent developments of tremendous importance in terms of the perception of democracy as a shared value and as the system of government that provides the best conditions for promoting respect for human rights, for reducing poverty and for encouraging development.

60. The African Union, which is to replace the Organization of African Unity, has acknowledged democratic institutions as a common value and a factor of political identity. The Constitutive Act of this new international organization was signed in Lomé, Togo, on 1 July 2000. The preamble to this instrument refers to the need to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and ensure good governance and the rule of law.

61. Article 3 establishes the objectives of the African Union, which include the promotion of popular participation and good governance and the promotion and protection of human and peoples' rights in accordance with the African Charter on Human and People's Rights and other relevant human rights instruments. Article 4 sets out the principles underlying the Union, including non-interference in internal affairs and respect for democratic principles, human rights, the rule of law and good governance.

62. Article 17 establishes the Pan-African Parliament. Article 18 sets up a regional Court of Justice, while article 23 deals with the imposition of sanctions on any member State that fails to comply with the decisions and policies of the Union. The sanctions comprise, in particular, denial of transport and communications links and other measures of a political and economic nature to be determined by the Assembly of the Union. Article 30 contains a democracy clause, similar to the clauses that exist in the Americas, whereby Governments that come to power through unconstitutional means will not be allowed to participate in the activities of the Union.

D. Protective norms and mechanisms for promotion and protection of democracy in the Commonwealth

63. The 54 member States of the Commonwealth have also undertaken the twofold commitment to adopt standards to protect democracy as the system of government permitting the fulfilment of human rights and to set up mechanisms of collective action for the promotion and protection of democracy. These developments have been made possible, as the Secretary-General of the Commonwealth testifies, because "a resurgence of popular aspirations for democracy and fundamental freedoms has been taking place, with coups d'états and military regimes falling into disfavour and many States moving from one-party rule to multi-party democracy. Non-governmental organizations and community groups have become increasingly active in articulating human rights concerns and campaigning for basic human rights, not only for victims of human rights abuses but also for politically and economically disadvantaged groups".[24]

64. The Harare Declaration (1991) contains a definite commitment to human rights and democracy. Among the principles guiding community action it includes support for democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government.[25]

65. The Declaration also reaffirms the commitment of member countries to the principles of the liberty of the individual under the law, equal rights for all citizens regardless of gender, race, colour, creed or political belief, and the individual's inalienable right to participate by means of free and democratic political processes in framing the society in which he or she lives.

66. In 1995 the Commonwealth countries approved the Millbrook Action Programme in order to put into practice the principles adopted in Harare concerning the promotion and protection of democracy and human rights. An action group made up of ministers of foreign affairs was set up as a mechanism for dealing with and coordinating collective responses to serious and persistent violations of these principles.

67. Ways and means are also available for providing various forms of cooperation and technical assistance to deal with electoral and constitutional problems, to strengthen the rule of law and the judiciary, to improve governance, to send out electoral observation missions, and to strengthen democratic culture and parliamentary practices.

68. In the event of a clear deterioration in democratic institutions or a coup d'état affecting a democratically elected government, the Commonwealth is empowered in the first instance to adopt measures to encourage the restoration of democracy within a reasonable period, including the dispatch of a commissioner or a mission to support the mediation work of the Secretary-General. If democratic institutions are not restored and a fair and free electoral process is not instituted within a reasonable time, additional measures are taken which may lead to the suspension of the member State and of technical assistance programmes.

E. Protective norms and mechanisms for the promotion and protection of democracy in Europe

69. Under the aegis of the Council of Europe, democratic rights and freedoms were enshrined in the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms and the subsequent protocols and in a number of other complementary instruments such as the 1961 European Social Charter (revised in 1996), the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the 1995 Framework Convention for the Protection of National Minorities. Democracy is a factor of identity and a requirement for membership of the Council and is seen as the social, institutional and political context within which the enjoyment of human rights and fundamental freedoms can be secured.

70. The Council has established a compulsory collective system to ensure respect for the principles of democracy and human rights, based on mutual cooperation and monitoring carried out through a set of political and legal monitoring procedures. Respect for intrinsic democratic values is not considered an exclusively internal matter but one that entails, on legitimate legal and political grounds, the responsibility of all member States, both individually and collectively. The Statute of the Council of Europe and its practice determine the conditions for membership of the Council. The rule of law, the existence of a pluralist democracy and the exercise of guarantees ensure the enjoyment of human rights.

71. In the event of persistent violations of human rights or non-compliance with monitoring procedures, the Council of Europe may adopt sanctions, which in extreme cases could lead to the expulsion of the State concerned. However, the purpose of the monitoring mechanisms is not to impose sanctions but to identify problems and help overcome them. The task of the Committee of Ministers is thus to examine in a constructive way the questions brought before it and to support member States through dialogue and cooperation, in order to persuade them to take appropriate measures to uphold democratic and human rights standards.

72. The European Union also identifies with democratic and human rights values. To protect the political rights of individuals living in the European Union, it has established the office of European Ombudsman, with powers to provide quasi-jurisdictional protection to those who believe that their political rights, based on the principles of democracy and the rule of law, have been impaired by an administrative act by one of the community institutions.

73. In December last year, the member countries of the European Union signed the Treaty of Nice, which, although it has not yet entered into force, contains provisions for possible European Union decisions in cases of grave violations by a member State of the principles of respect for democracy and human rights.

F. Protective norms and mechanisms for the promotion and protection of democracy within the Organization for Security and Cooperation in Europe

74. The developments that have taken place in Eastern Europe and the transition to the rule of law and democracy are among the most dynamic changes that have occurred in the process of democratization in the world. The democratic borders of Europe have expanded and,

notwithstanding the resurgence of ethnic and national conflicts, this is a trend that affects all European States. Against this background, the Organization for Security and Cooperation in Europe in its Copenhagen Declaration (1990), has established as factors of identity and requirements for membership a democratic system of government, the rule of law and the protection of human rights. Recognizing that internal tension or conflict cannot be ruled out owing to social and political changes, the Declaration places precise limits on any decision by a State to restrict human rights, in accordance with international standards and practice.

75. As has been pointed out, "the relevance of the Copenhagen Declaration, and its originality, lies in its assertion that the protection of human rights is 'one of the basic purposes of government', that freely elected governments are essential for the protection of those rights and that the States involved in the OSCE process have a responsibility to protect democratically elected governments under threat from acts of violence or terrorism".[26]

76. OSCE has an Office for Democratic Institutions and Human Rights, which is responsible for carrying out projects and programmes to strengthen the institution of democracy. It also has mechanisms to monitor situations in which the rule of law and the democratic system are harmed or jeopardized, through fact-finding missions, assessments and rapporteurs with specific mandates. The work of these mechanisms focuses on the protection and development of the ongoing processes of democratization.

G. Protective norms and mechanisms for the promotion and protection of democracy in States belonging to the French-speaking community

77. In the Bamako Declaration adopted on 3 November 2000, States belonging to the French-speaking community reaffirmed their commitment to the basic principles of democracy as a system of universal values based on the recognition of human rights and the principles and norms of the rule of law. At the same time, they undertook to strengthen the institutions that could help consolidate the rule of law, encourage the renewal and modernization of parliaments, ensure the independence of the judiciary and promote free, credible and transparent elections.

78. The Bamako Declaration also lists a number of procedures for monitoring and implementing practices favourable to democracy, human rights and fundamental freedoms. These mechanisms include monitoring and preventive action and the adoption of specific measures in cases of serious irregularities in the democratic system. If crises occur, provision is made to send a mediator or facilitator, subject to prior acceptance by the State concerned, to seek mutually agreeable solutions. In the event of a collapse or breakdown of democracy, the issue may be taken up urgently by the Standing Council, which may make a public statement, send an observer mission or mission of good offices, and, if all else fails, adopt measures such as suspending the country concerned from meetings of its bodies or suspending multilateral cooperation, with the exception of programmes that benefit the civilian population or that are conducive to the re-establishment of democracy.

IV. THE EMERGENCE OF AN INTERNATIONAL REGIME ON DEMOCRACY AND HUMAN RIGHTS: THE RIGHT TO DEMOCRACY

79. The growing number of legal and political instruments that now recognize democracy as a universal value, together with the spread of norms adopted by States to promote and protect it subject to a certain international guarantee - with the introduction of so-called "democratic clauses" entailing a degree of international responsibility in cases where there is a serious irregularity or a breakdown in the democratic system - are gradually leading to the creation of an international regime on the institution of democracy and on its promotion and protection.

80. An international regime can be defined as a set of principles, norms, rules and procedures, including coercive measures of various kinds, which govern the relationships between States and determine which kinds of behaviour are legitimate and which are to be considered dysfunctional.[27] Because of the existing interdependence between human rights and democracy, because of the normative, conceptual and instrumental links between the various international instruments governing them, and because human rights and democracy are materially and conceptually difficult to separate in practice, the emerging international regime on democracy, before asserting itself in its own right, is tending to form part of the international human rights regime.

81. Many of those writing about international human rights law are therefore beginning to consider democracy as a human right or, in the words of Hannah Arendt, as the right to have rights. The right to democracy, in this context, could be defined as the subjective capacity of individuals and peoples to demand of their rulers a political regime based on the rule of law and separation of powers, in which citizens can periodically elect their leaders and representatives in free and fair elections, on the basis of the interaction between a number of political parties, full respect for the exercise of the freedoms of expression, the press and association and the effective enjoyment of human rights.

82. Antonio Cancado Trindade, President of the Inter-American Court of Human Rights, referring to the move four-and-a-half decades ago to lay the groundwork for the internationalization of the protection of human rights, has recalled that "it is possible that we are today about to enter the initial phase of an equally encouraging large-scale phenomenon with far-reaching implications, the international promotion of democracy itself and the rule of law".[28]

83. The internationalization of the protection of democracy in a process linked directly to human rights is already happening, if one considers the normative protection structures already in place in Europe, the Americas and Africa, as well as developments that have occurred in recent years in the United Nations legal framework and in international relations as a whole.

V. A HOLISTIC VIEW OF THE INTERRELATIONSHIPS BETWEEN DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW COVERS ALL HUMAN RIGHTS, INCLUDING SOCIAL, ECONOMIC AND CULTURAL RIGHTS

84. The link between democracy and human rights is not limited to civil and political rights but necessarily covers economic, social and cultural rights as well as third-generation rights. Democracy does not stop with the formal structure of the rule of law or the indispensable periodic replacement of rulers following free and fair elections. The legitimacy of government vis-à-vis the governed needs to be established and constantly renewed. This implies the capacity to establish an inclusive relationship with all sectors of society, eliminating racism and all forms of xenophobia and respecting cultural and ethnic as well as regional and national diversity. Basically, however, the legitimacy of democracy as a system of government does not lie only in the State's legal norms but also in a relationship between government and the governed that is based on social cohesion and on encouraging citizens and the institutions of civil society to participate in decision-making processes.

85. Democracy and the rule of law should not only ensure compliance with the duty to guarantee the enjoyment of civil, political and human rights, but should also be able little by little to realize the economic and social rights of the population. In this context, the fight against poverty and extreme poverty, extreme social inequality and unfair income distribution is fundamental to legitimizing the exercise of power in a democratic system. From a sociological and political point of view, democracy should transfer powers, in order to allow the poor and marginalized members of society a status of citizenship, which integrates them fully in the political and economic system and makes them directly responsible actors at the national, regional and local levels in economic and social development strategies and policies.

86. From this perspective, at both the national and the international level, human rights, democracy and the right to development are interrelated, as recognized in Vienna at the World Conference on Human Rights.

VI. THE REALIZATION OF HUMAN RIGHTS AND THE QUALITY OF DEMOCRATIC INSTITUTIONS: GOVERNANCE, RESPONSIBILITY AND THE FIGHT AGAINST CORRUPTION

87. Although in the past decade democracy has made unprecedented progress and is increasingly seen as a universal value linked to the exercise and enjoyment of human rights, in many countries, especially in developing regions, its legitimacy and functioning are nevertheless in various states of crisis. This is basically because in quite a lot of cases the limited and inadequate development of civil society and the rule of law has led to a situation in which representative democracy functions in practice as a sort of "democracy by delegation", in which democratically elected Governments, once in power, lose their legitimacy, become detached from the electorate, unduly concentrate political power in the hands of a few and govern in a way that places the will of the ruler above the Constitution and the law, thus affecting the separation of powers and the functioning of the democratic political system.

88. In addition, there are other new threats to democracy, such as bad government and corruption, which contribute to the loss of legitimacy of democracy in specific situations. Corruption, in particular, is a problem that arises in all parts of the world, with serious consequences for governance and democratic legitimacy. When it becomes systematic and is associated with the exercise of political power, it pervades public institutions and establishes the kind of relationship between the citizen and the State in which the betterment of an individual or group, the illegal appropriation of State funds, the unpunished abuse of authority and the collusion of the judicial apparatus delegitimize the very foundations of the rule of law.

89. Widespread corruption, by eroding the foundations of the rule of law, also tends to seriously undermine the protection of human rights, especially in relation to the loss of autonomy in the administration of justice and the subsequent violations of due legal process. It is not exceptional for State corruption to be mirrored in limits on the right to freedom of expression and of the press and in specific violations of human rights, including the rights to personal liberty and to life.

90. Good governance, or, to be more precise, best practice in good governance, requires a State administration that is capable of preventing and combating corruption. Judicial and administrative controls are important but not enough on their own. The monitoring of governmental integrity must also involve the media and civil society.

VII. PRELIMINARY CONCLUSIONS

(1) The end of the system of power blocks, a leftover of the cold war, paved the way for the gradual adoption worldwide of the intrinsic values of democracy and the rule of law, which draw legitimacy from the universal system for the protection of human rights.

(2) Globalization, regardless of its ambivalent effects on the economic and social life of peoples, also promotes values like democracy and human rights, which increasingly enjoy international protection.

(3) The effects of this process are increasingly felt in the sphere of values and policy. Cultural and social exceptions or characteristics are not recognized as limits to the protection of human rights or to democracy. At the same time, the spread of democracy around the world does not clash with national particularities or cultural diversity, which, on the contrary, it takes as given and has a duty to promote.

(4) Since the end of the 1980s, the momentum towards democracy has received an unprecedented impetus in what is basically an internal process corresponding to the democratic aspirations and struggles of peoples.

(5) At the international level, this process is reflected in the adoption of norms and institutional structures linking democracy and the protection of human rights in a relationship of mutual dependence and incorporating the legal and political protection of democracy as an increasingly universal value. It is also reflected in the adoption of mechanisms to promote

democracy, prevent situations that might affect or threaten democratic institutions and apply various kinds of sanctions in cases where there is a serious breach or breakdown of the democratic order.

(6) This process is leading to the emergence of an international regime on democracy and human rights that is based on shared values, regulatory norms and institutions to promote and protect them, including mechanisms for collective action agreed upon by States freely exercising their national sovereignty.

(7) The international protection of democracy and its increasing regulation as an international obligation in various regional and subregional forums for inter-State cooperation, as well as the granting to individuals and peoples of subjective powers to demand a democratic form of government or the enforceability of their political rights, are spurring legal writers to affirm an emerging right to democracy.

(8) Independently of the legitimacy of democracy and the rule of law as part of the State framework for realizing human rights, and of their gradual dissemination worldwide, democratic systems of government are faced in many countries with problems related to their functioning, representativeness and legitimacy.

(9) These problems are related to the lack or weakness of mechanisms for dialogue and participation that would enable civil society and the people at large - especially the poorest and most marginalized in society - to have more of a say in policy decisions and in the authorities' actions and monitoring procedures.

(10) The persistence of poverty and critical levels of poverty, the exclusion and marginalization of large sectors of the population and the lack of development opportunities are also serious situations and a potential source of conflict that militate against good governance and democratic stability.

(11) Corruption, especially when it becomes systematic and affects government institutions, is a serious threat not only to democracy but also to the rule of law itself, because of its implications for impunity, and may result in the loss of legitimacy of the system.

(12) Beyond the norms and institutional mechanisms adopted in the international arena to promote, consolidate or protect the institution of democracy, it is essential that international action should adopt a holistic approach and should recognize the links between democracy, human rights, the rule of law, good governance and the integrity of the public authorities, and structural supports for democracy, such as the fight against poverty and extreme poverty, development, social cohesion, inclusive social policies and the integration of women in the political process and productive activities.

Notes

[1] See Commission on Human Rights resolution 1999/57 on Promotion of the Right to Democracy, E/CN.4/1999/167 and Add.1.

[2] Manuel Aragón Reyes, "Estado y Democracia" (State and democracy) in El derecho público en finales de siglo, Madrid, Eduardo García de Enterría and Manuel Clavero Arévalo, 1997, p. 43.

[3] Universal Declaration of Human Rights, General Assembly resolution 217 A (III) of 10 December 1948, arts. 7-11.

[4] Ibid., art. 21, para. 3.

[5] International Covenant on Civil and Political Rights, General Assembly resolution 2000/200 A (XXI) of 16 December 1966, art. 25.

[6] See Inter-American Court of Human Rights, The word "laws" in article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of 9 May 1986. Series A: Judgements and Opinions No. 6, paras. 30 and 31.

[7] See Inter-American Court.

[8] Charter of the Organization of American States, OAS, Washington, 1998.

[9] American Declaration on the Rights and Duties of Man, 1948.

[10] A 51/761, para. 27.

[11] Of the 11 territories subject to the international trusteeship system, Togoland, Tanganyika, Cameroons, Ruanda-Urundi, Western Samoa, Nauru and New Guinea achieved independence or self-government by democratic means.

[12] Jean-Pierre Cot and Alain Pellet, La Charte des Nations Unies, Paris, Economica-Bruylant, 1985, p. 1114.

[13] Report of the Secretary-General on enhancing the effectiveness of the principle of periodic and genuine elections, dated 19 November 1991, A/46/609, para. 32.

[14] Report of the Secretary-General on enhancing the effectiveness of the principle of periodic and genuine elections, A/52/474, para. 3.

[15] A/52/513 of 21 October 1997.

[16] See A/52/18 of 2 March 1998, A/51/31 of 20 January 1997, A/50/133 of 16 February 1996 and A/49/30 of 22 December 1994.

[17] American Declaration of the Rights and Duties of Man, 1948.

[18] Manuel Rodriguez Cuadros, "La evolución de las relaciones interamericanas"; in Política Internacional, Lima, CEPEI, 1998.

[19] Article 3 of the OAS Charter, as amended by the Protocol of Washington of 14 December 1992.

[20] Eduardo Vio Grossi, "La democracia representativa: obligación jurídica interamericana"; in La democracia en el sistema interamericano, Washington, OAS, 1998.

[21] Arlene B. Tickner, compiler, Sistema interamericano y democracia, Washington, 2000.

[22] Organization of American States, resolution of San José, Costa Rica, Inter-American Democratic Charter, OEA/SER.P.AG/Res.1838 (XXXI-0/01), 5 June 2001.

[23] The democracy clause was established in the Andean Community by the commitment of the Andean Community for Democracy, Lima, 10 June 2000; in Mercosur by the Ushuaia Protocol on democratic commitment; and in the Rio Group through the Declaration on the defence of democracy approved in Asunción on 4 August 1997.

[24] Letter dated 23 April 1993 from the Commonwealth Secretary-General addressed to the Assistant Secretary-General for Human Rights (A/CONF.157/PC/89), para. 4.

[25] Harare Declaration, Harare, 1991.

[26] Antonio Cancado Trindade, "Democracia y derechos humanos: el régimen emergente de la promoción internacional de la democracia y del estado de derecho", in La Corte y el Sistema Interamericano de Derechos Humanos. San José de Costa Rica, CIDH, 1994, p. 524.

[27] Stephen D. Krasner, ed., International Regimes. Cornell University Press, 1993.

[28] Antonio Cancado Trindade, op. cit.